83-995

NO. [redacted]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

LOUIE L. WAINWRIGHT
Secretary,
Florida Department of Corrections, etc.,
Petitioners/Cross-Respondents

vs.

HOWARD VIRGIL LEE DOUGLAS
Respondent/Cross-Petitioner

On Cross-Petition for a Writ of Certiorari
to the United States
Court of Appeals for the
Eleventh Circuit

BRIEF OF PETITIONERS/CROSS-RESPONDENTS ON JURISDICTION

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TABLE OF AUTHORITIES

As provided in Rules 22 and 34.2, since all preliminary matters set forth in Rule 34.1(b-g) have been thoroughly and accurately stated in both the petition for writ of certiorari and the cross-petition for writ of certiorari, cross-respondents will omit same.

REASONS FOR NOT GRANTING THE WRIT ON CROSS-PETITION

Public Trial Issue

Douglas says that his right to a public trial under the Sixth Amendment was violated by virtue of the limited closure which took place in his trial. He says that the precise issue has not previously been before this Court for decision. While it is true that the issue has not been subject to direct decision by this Court, it is also true that the precise question in this case was presented in the petition for writ of certiorari previously denied by this

Court. See Douglas v. Florida, 429 U.S. 871 (1976).

The only difference regarding the issue is that there, he sought review of the Florida Supreme Court's determination that no Sixth Amendment deprivation occurred and here, he seeks review of the Eleventh Circuit Court of Appeals' identical determination.

Douglas merely presents the essential contention that his right to a public trial is absolute and that any reasons which may have favored closure did not outweigh that right. He does little if anything to present compelling argument directed to any claimed deficiency contained in the circuit court's analysis of the issue. He fails to reveal just how the decision either represents unacceptable precedent or is of such widespread effect that this Court should exercise its jurisdiction

and review the issue. The holding of the circuit court on this issue was nothing more than: based on the facts and circumstances of this case, the limited closure during the testimony of one witness was justified and thus, no Sixth Amendment violation occurred. This conclusion was based on a thorough and proper analysis of existing law on the subject. It was reached with full consideration of this Court's pronouncements on the general issue and followed well-established federal authorities from other circuit courts.

If anything has changed since Douglas last requested review on this issue, it is the rendering of this Court's decisions which provided more guidance to the federal courts below than was available to the Florida Supreme Court. Be that as it may, there is even less compelling reason to

grant review of the issue in its present posture than there was in 1976.

Invalid Prior Convictions

Here, Douglas presents an issue not appearing in his original petition. He claims that the trial court relied upon prior invalid convictions to reach the determination that the death sentence was appropriate. He claims further that the Florida Supreme Court, when reviewing that determination, likewise relied upon those convictions in approving the sentence.

Douglas proceeds as if the lower resolutions of this issue do not exist. In order to even accept the assertion one would necessarily have to flatly reject as a finding of fact, the respective determinations of the trial court, the Florida Supreme Court, the federal district court, and the circuit court of appeals. As the decisions

clearly show, the trial judge was aware that some of Douglas' convictions were invalid and clearly stated both at sentencing and years later in a hearing on a post-conviction motion that he specifically did not consider any convictions, whether valid or not, when arriving at his determination of sentence. The Florida Supreme Court made specific mention that such was not the case and likewise, both federal courts below ratified that determination of historical fact. Thus, in order to grant the writ on this basis one would necessarily and improperly have to make a contrary finding of fact without any evidentiary support, that which would be contrary to the teachings of Marshall v. Lonberger, ___U.S.___, 103 S.Ct. 843 (1983). Clearly, the proper invocation of this Court's jurisdiction should not and cannot rest on such a proposition.

Override of the Jury Recommendation

Disregarding the circuit court's treatment of this issue, Douglas blithely states that it is unconstitutional to impose a sentence of death in the State of Florida once the jury has made its recommendation of life imprisonment. That this practice is constitutionally permitted has been clearly and repeatedly stated by this Court. Proffitt v. Florida, 428 U.S. 242 (1976); Dobbert v. Florida, 432 U.S. 282 (1977); Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983).

Nothing Douglas presents provides any reason why this Court should reverse the holdings in these decisions.

CONCLUSION

Douglas comes here proceeding as if the Eleventh Circuit Court of Appeals made no decision whatsoever on the three issues he presents. He fails to either question or challenge the analyses of the issues by the court below and introduces no stimulus to conclude that those resolutions are such that this Court should and must accept review.

Accordingly, Petitioners/Cross-Respondents respectfully submit that the Court should deny the cross-petition for writ of certiorari.

Respectfully submitted on this _____day of January, 1984.

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